No. 96-48

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

LAKE AT LAS VEGAS INVESTORS GROUP, INC.,

Petitioner,

v.

BOTABA REALTY COMPANY, BSF PARTNERS, SID R. BASS, ROBERT M. BASS and LEE M. BASS,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

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CASES

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Paradise Palms Community Ass'n v. Paradise Palms Homes, 89 Nev. 27, 505 P.2d 596, *cert. den.*, 414 U.S. 865 (1973) 2

Sierra Pacific Power Co. v. Craigie, 738 F. Supp. 1325 (D. Nev. 1990) 3

RULES

Fed.R.Civ.P. 41(a)(1) 1

ARGUMENT

The points raised in the Opposition to the instant Petition are mistaken:

A. The Issue Presented Is Not Limited

The res judicata law to be applied to a prior diversity judgment does not depend on the legal issue decided in the preceding action, and there is no separate res judicata law for judgments arising from the two dismissal exception of Fed.R.Civ.P. 41(a)(1). Thus, the issue here presented is as stated in the Petition, and there is a widespread split and confusion over it among the Circuits.

B. The Issue Was Presented To Both The District Court And The Ninth Circuit

Contrary to the suggestion in the Opposition, the issue stated in the Petition *sub judice* was presented to both the District Court and the Ninth Circuit. On the appeal, it was presented both in the briefs and the Petition For Rehearing.

As indicated in the Petition, and as not disputed by respondents, the Courts of Appeals have been floundering for years with this issue. That the absence of a resolution over an extended period of time now produces decisions which do not even bother to address this outcome-determinative issue proves all the more the urgent necessity for this Court now to resolve it.

One of the cornerstones of the *Erie* doctrine is that the outcome of an action should not depend on whether it is brought in a state court or a federal court sitting in diversity. As it now stands, whether the outcome of a diversity case dependent upon the res judicata effect of a prior diversity judgment will be the same as the outcome of the same case brought in a state court can and does vary based not only on the Circuit in which the action is brought, but on the panel within a Circuit which hears the appeal. The rule of law and proper and fair administration of justice no longer can countenance such arbitrariness.

C. The Decision Below Is Directly Contrary To Nevada Law

As set forth in the cases cited in the Petition (page 5, fn. 1), Nevada law holds that to benefit from the res judicata (claim preclusion) effect of a prior judgment, one must be a party or the privy of a party to the prior judgment. Respondents nonetheless claim that privity is not a requirement of "res judicata" under Nevada law.

As prior briefs in this litigation have repeatedly pointed out, despite use of the generic term "res judicata" in the cases cited by respondents, the Nevada Supreme Court's *Paradise Palms* decision, and the California Supreme Court's *Bernhard* decision which is quoted extensively in *Paradise Palms*, dealt with collateral estoppel (issue preclusion), *not* res judicata (claims preclusion). Under the doctrine of collateral estoppel (issue preclusion), mutuality of privity no longer is necessary.

However, no case in Nevada or elsewhere ever has eliminated privity as a requirement for a non-party to a prior judgment to invoke *claim* preclusion successfully, which respondents have been allowed to do here. As this Court stated in *Nevada v. United States*, 463 U.S. 110, 143 (1983), "while mutuality of estoppel has been for the most part abandoned in cases involving collateral estoppel, it has remained a part of the doctrine of res judicata."

The use in Nevada state court cases of the generic term "res judicata" when actually referring to collateral estoppel has been noted to have created much confusion. *Sierra Pacific Power Co. v. Craigie*, 738 F. Supp. 1325, 1327-29 (D. Nev. 1990). Respondents continue to play upon that confusion in their Opposition.

Respectfully submitted,

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